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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2020-07; FAR Case 2018-022; Item V; Docket No. FAR-2019-0010; Sequence No. 1]

RIN 9000-AN80

Federal Acquisition Regulation: Orders Issued via Fax or Electronic Commerce

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending a Federal Acquisition Regulation (FAR) clause to permit the issuance of task or delivery orders via facsimile or electronic commerce and clarify when an order is considered "issued" when using these methods.

DATES: *Effective:* [Insert date 30 days after date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at (202) 501-1448 or curtis.glover@gsa.gov for clarification of content. For

information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at (202) 501-4755. Please cite FAC 2020-07, FAR Case 2018-022.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the ***Federal Register*** at 84 FR 44270 on August 23, 2019, to update a clause to permit the issuance of task or delivery orders via fax or electronic commerce and clarify when an order is considered "issued" when using these methods. Two respondents submitted comments on the proposed rule.

FAR clause 52.216-18, Ordering, currently states that task or delivery orders may be issued orally, by fax, or electronic commerce only if authorized in the contract schedule. If mailed, task or delivery orders are considered "issued" when the Government puts the order in the mail. The clause is included in solicitations and contracts when an indefinite-delivery definite-quantity, requirements, or indefinite-delivery indefinite-quantity contract is contemplated.

As part of today's business environment, the Government and Federal contractors frequently use email, fax (via computer, online service, or machine), or other electronic commerce methods to communicate with one

another. In an effort to reflect current business practices and maintain speed and efficiency in the ordering process, this rule updates FAR clause 52.216-18 to no longer require a separate authorization in the contract to use electronic commerce or fax to issue task or delivery orders. The rule also identifies when a task or delivery order is considered "issued" when using such methods. As a result, contracting officers will no longer need to include supplemental ordering language in the contract when anticipating the use of fax or electronic commerce to issue task or delivery orders. Ordering information will be located in one place in the contract. A common understanding of when a task or delivery order is considered issued, in such situations, will be applied Governmentwide.

As task or delivery orders are not issued orally as frequently as other issuance methods and the use of such a method is dependent upon the particular circumstances of the procurement, the authority to issue orders orally must still be separately authorized under the contract and is not being amended by this rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils)

reviewed the public comments in the development of the final rule. Both comments were outside of the scope of this rule and no changes were made to the final rule as a result of public comments.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This final rule does not create any new provisions or clauses, nor does it change the applicability or burden of any existing provisions or clauses included in solicitations and contracts valued at or below the SAT, or for commercial items, including COTS items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not

subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) are amending a Federal Acquisition Regulation (FAR) clause to automatically permit the issuance of task or delivery orders via fax or electronic commerce, without additional authorization text in the contract and to clarify when an order is considered to be "issued" when using these methods. The objective of the rule is to update the clause to reflect current business practices and maintain speed and efficiency when issuing task and delivery orders under a contract.

No public comments were received in response to the initial regulatory flexibility analysis. DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The rule simply formalizes a current business practice. The Government does not collect data on the total number of task and delivery orders issued by mail, fax, and/or electronic commerce. However, the Federal Procurement Data System (FPDS) provides the following information for fiscal year 2018:

The Federal Government awarded approximately 17,690 new indefinite-delivery indefinite-quantity, indefinite-delivery definite-quantity, and requirements contracts; of which approximately 62 percent were awarded to approximately 7,420 unique small business entities.

This rule does not impose any Paperwork Reduction Act reporting, recordkeeping, or other compliance requirements on any small entities. There are no known significant alternative approaches to the rule that would meet the stated objectives.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 52

Government procurement.

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Therefore, DoD, GSA, and NASA amend 48 CFR part 52 as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 52.216-18 by—
- a. Revising the date of the clause;
 - b. Revising paragraph (c); and
 - c. Adding paragraph (d).

The revisions and addition read as follows:

52.216-18 Ordering.

* * * * *

ORDERING ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF
PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(c) A delivery order or task order is considered “issued” when—

(1) If sent by mail (includes transmittal by U.S. mail or private delivery service), the Government deposits the order in the mail;

(2) If sent by fax, the Government transmits the order to the Contractor’s fax number; or

(3) If sent electronically, the Government either—

(i) Posts a copy of the delivery order or task order to a Government document access system, and notice is sent to the Contractor; or

(ii) Distributes the delivery order or task order via email to the Contractor's email address.

(d) Orders may be issued by methods other than those enumerated in this clause only if authorized in the contract.

(End of clause)

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